STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal From Michigan Court of Appeals #234661 (Judge Owens)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

MICHAEL BRANDON SCHERF,

Defendant-Appellee.

SUPREME COURT NO.: 121698

COURT OF APPEALS NO.: 234661

CIRCUIT COURT NO.: 00-337-AR

LOWER COURT NO.: 00-1138-SM

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENTS REQUESTED

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I. WHETHER THE EVIDENCE OBTAINED AGAINST THE DEFENDANT AS A RESULT OF THE SEARCH OF HIS PERSON INCIDENT TO HIS ARREST WAS PROPERLY SUPPRESSED WHERE THE ARREST WARRANT UPON WHICH THE ARREST WAS MADE WAS ISSUED WITHOUT THE REQUIRED AFFIDAVIT AND WHERE MICHIGAN HAS NOT ADOPTED THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE.

The Trial Court answered, "No."

The Circuit Court as Appellate Court answered, "Yes."

The Court of Appeals answered, "Yes."

The Defendant-Appellee answers, "Yes."

The Plaintiff-Appellant answers, "No."

II WHETHER THIS COURT SHOULD ADOPT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WHERE THAT EXCEPTION IS CONTRARY TO AND WOULD BE A SUBSTANTIAL DEPARTURE FROM THIS STATE'S EXISTING JURISPRUDENCE.

The Trial Court answered, "Yes."

The Circuit Court did not answer this question.

The Court of Appeals answered, "Yes."

The Defendant-Appellee answers, "No."

The Plaintiff-Appellant answers, "Yes."

COUNTER-STATEMENT OF FACTS

On October 4, 1996, an Order was entered assigning the Defendant to Holmes Youthful Trainee status and placing the Defendant on probation for a period of twenty-four (24) months. The court entered an Order of Probation on October 21, 1996, requiring the Defendant to report monthly as requested by the probation officer and requiring the Defendant to notify the probation officer immediately of any change of address. Sometime in late 1997, the Defendant failed to report and changed addresses without notification.

On January 28, 1998, Janice Mascho, an agent of the Department of Corrections, filed a Petition requesting that a bench warrant be issued against the Defendant, Michael Scherf, and that he be arrested and held in contempt of court for violation of rules 3 and 4 and of the Order of Probation (Appendix, p 1b). Her Petition asks that the Defendant be held in contempt of court for a contempt committed outside of the immediate presence of the court (*i.e.* a violation of the Order of Probation). However, this petition was not supported by an affidavit as required by MCR 3.606 (A). (Appendix, p 2b) Nonetheless, even in the absence of a proper affidavit supporting probable cause to arrest, the trial court issued a bench warrant for the arrest of the Defendant and commanded any peace officer or court officer authorized to make arrests to do so.

The Defendant was arrested on July 28, 2000, pursuant to this bench warrant. While searching the Defendant incident to the arrest, the officers discovered that the Defendant was in possession of a small amount of marijuana. The Defendant was then charged with misdemeanor possession of marijuana.

The Defendant sought to suppress the evidence obtained from his person during the search incident to the arrest arguing that the bench warrant upon which the arrest was based was invalid and therefore, the search incident to the arrest was constitutionally infirm. In an Opinion dated October 25, 2000 (Appendix, p 12a), the District Court denied Defendant's Motion to Suppress. The District Court found that the petition was confirmed by oath or affirmation. The court suggested that the defense was being "over technical in their reading of the Court Rules" and was satisfied that the petition was in proper form to support the issuance of a bench warrant. The court also found *Arizona* v *Evans*, 514 US 1; 115 S Ct 1185; 131 L Ed2d 34 (1995), persuasive.

Defendant appealed this decision to the Isabella County Circuit Court. The Circuit Court reversed the decision of the District Court concluding that the bench warrant was invalid and that the "good faith" exception to the exclusionary rule does not apply in Michigan (Appendix, p 13a). The Court of Appeals granted leave to appeal.

In a published opinion (Appendix, p 15a), the Court of Appeals believed that the circuit court erred as a matter of law by not applying the "good faith" exception to the exclusionary rule. However, the Court of Appeals recognized that prior decisions of that court specifically refused to adopt the "good faith" exception to the exclusionary rule. Thus, the Court of Appeals concluded that it was compelled to affirm the decision of the circuit court. However, the Court stated that were it not bound by MCR 7.215(I)(1), it would reverse the circuit court. The prosecution filed an Application for Leave to Appeal asking this Court to adopt the "good faith" exception to the exclusionary rule and reverse the ruling of the Court of Appeals and Circuit Court. This Court granted leave to appeal in an Order dated July 30, 2002.

The Defendant asks this Court to affirm the Opinion of the Court of Appeals for the reason that the evidence obtained against the Defendant as a result of the search of his person incident to his arrest was properly suppressed because the bench warrant upon which the arrest was made was invalid, and Michigan has not adopted the "good faith" exception to the exclusionary rule. Defendant also contends that under no circumstances should this Court adopt the "good faith" exception to the exclusionary rule.

ARGUMENT

I. THE EVIDENCE OBTAINED AGAINST THE DEFENDANT AS A RESULT OF THE SEARCH OF HIS PERSON INCIDENT TO HIS ARREST WAS PROPERLY SUPPRESSED WHERE THE ARREST WARRANT UPON WHICH THE ARREST WAS MADE WAS ISSUED WITHOUT THE REQUIRED AFFIDAVIT AND WHERE MICHIGAN HAS NOT ADOPTED THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE.

Before a judicial officer can issue an ***arrest or search warrant***, the judicial officer must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *Whiteley* v *Warden*, Wyoming State Penitentiary, 401 US 560; 91 S Ct 1031; 28 L Ed2d 306 (1971). This requirement exists in both the United States and Michigan Constitutions.[1] The arrest warrant executed against the Defendant in this case was invalid as it was issued contrary to the significant requirement that its issuance be supported by an affidavit. MCR 3.606(A). The purpose of the affidavit is to provide sufficient facts upon which the probable cause determination necessary to the issuance of the arrest warrant can be made. In the absence of the affidavit, the issuance of the arrest warrant violated the Defendant's rights under the Fourth Amendment of the United States Constitution and Article I, Section 11, of the Michigan Constitution to be free from

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[1]The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 11, of the Michigan Constitution provides, "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

seizure unless based upon a warrant supported by probable cause. The circuit court properly reversed the district court's denial of the Defendant's Motion to Suppress where the evidence was obtained incident to his arrest on this invalid arrest warrant..

Furthermore, since Michigan jurisprudence has never recognized the "good faith" exception to the exclusionary rule, the district court's reliance upon *Arizona* v *Evans*, which adopted the reasoning in *US* v *Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed2d 677 (1984), was misplaced. Since no Michigan case has ever adopted the good faith exception to the exclusionary rule, the circuit court properly reversed the district court and the Court of Appeals properly affirmed (notwithstanding its stated desire to recognize the good faith exception and apply it in this case). Accordingly, there is no error by the Court of Appeals or the Circuit Court for this Court to review or reverse. Nonetheless, the prosecution is urging this Court to adopt the "good faith" exception to the exclusionary rule and apply it to the facts in this case. This Court should resist any urge to do so.

A. The Court of Appeals Properly Affirmed the Ruling of the Circuit Court Suppressing the Evidence.

In *People* v *Burrill,* 391 Mich 124; 214 NW2d 823 (1974), this Court confirmed that a defendant's remedy when evidence is seized during an arrest based upon an invalid warrant is suppression of the evidence. In that case, the arrest warrant was invalid because of defects in the form of the allegations set forth in the complaint supporting the issuance of the arrest warrant. Although the defendant in *Burrill* argued that the invalidity of the arrest warrant stripped the circuit court of jurisdiction altogether, this Court disagreed and concluded that "the sole sanction" for the

invalidity of an arrest warrant is the suppression of evidence obtained from the person following his illegal arrest.

Burrill, teaches us that an arrest warrant must be issued consistent with proper procedure provided by law or court rules. This is the essence of procedural due process and is not merely a clerical or ministerial duty nor a technicality as suggested by the district court in its opinion. Quite simply, an arrest which is based upon an invalid warrant is unlawful and, therefore, the suppression of any evidence obtained during a search incident to that arrest is required. *Burrill, supra.*

The *Burrill* court relied upon the United States Supreme Court case of *Whiteley* v *Warden, Wyoming State Penitentiary*, 401 US 560; 91 S Ct 1031; 28 L Ed2d 306 (1971). The *Whiteley* court found that the complaint upon which the arrest warrant was issued could not support a finding of probable cause by the issuing magistrate. The Court found that the petitioner's arrest pursuant to that warrant violated his constitutional rights under the Fourth and Fourteenth Amendments and, accordingly, the evidence secured incident thereto, "should have been excluded from his trial." *Whiteley, id* p 569. In the present case, the circuit court correctly concluded that the bench warrant was issued improperly in the absence of the required affidavit and reversed the district court's denial of the Defendant's request to suppress the evidence.

The district court also relied upon *Arizona* v *Evans, supra,* as persuasive authority. The circuit court rejected the district court's reliance on *Arizona* v *Evans* and concluded that the "good faith" exception to the exclusionary rule does not apply in Michigan. The circuit court did not err in its determination. However, the Court of Appeals found that this was error and that this state should recognize the "good faith" exception to the exclusionary rule. Nonetheless, the Court of Appeals affirmed the circuit court. Notwithstanding the Court of Appeals' urging, neither this Court

nor any court in this State, has adopted the "good faith" exception to the exclusionary rule and it should not.

B. Michigan Has Never Adopted The "Good Faith" Exception to The Exclusionary Rule.

Michigan jurisprudence does not and has never recognized a "good faith" exception to the exclusionary rule. In no less than 20 cases, this Court and the Court of Appeals have failed to adopt the "good faith" exception to the exclusionary rule.[2] More importantly, many of these cases were decided after the release of the United States Supreme Court's decision in *People* v *Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed2d 677 (1984). See *People* v *Hall* (1987); *People* v *Tanis* (1986); *People* v *Jackson* (1989); *People* v *Scherbine* (1984); *People* v *Landt* (1991); *People* v *Hill* (1991); *People* v *Sundling* (1986); *People* v *Sellars* (1986), As the court in *Sellars*, *supra*, observed:

> As to the prosecution's assertion of the good faith exception enunciated in *US* v *Leon*, *supra*, it should be noted that *Leon* was decided on July 5, 1984, and *Scherbine* was not decided until December 28, 1984. We must concluded that it is the intent

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[2]See *People* v *Haddad*, 122 Mich App 229, 232; 333 NW2d 419 (1981); People v Bloyd, 416 Mich 538, 556; 331 NW2d 447 (1982); People v Wagner, 114 Mich App 541, 574-575; 320 NW2d 251 (1982) [Bronson J., concurring]; People v Hall, 158 Mich App 194; 404 NW2d 219 (1987); People v Scherbine, 421 Mich 502; 364 NW2d 658 (1984); People v Landt, 188 Mich App 234; 469 NW2d 37 (1991); People v Hill, 192 Mich App 54; 480 NW2d 594 (1991), *lv* 439 Mich 968 (1992); People v Sellars, 153 Mich App 22, 28; 394 NW2d 113 (1986); People v Sundling, 153 Mich App 277; 395 NW2d 308 (1986); *lv app d* 428 Mich 887 (1987); People v Tanis, 153 Mich App 806, 813; 396 NW2d 544 (1986); People v Hellis, 211 Mich App 634; 536 NW2d 587 (1995); People v David, 119 Mich App 289; 326 NW2d 485; *lv app d* 417 Mich 858 (1983); People v Paladino, 204 Mich App 505, 507; 516 NW2d 113 (1994) [although the court would have adopted the "good faith" exception if not bound by MCR 7.215(I)(1)]; In Re Forfeiture, 171 Mich App 200; 431 NW2d 437 (1988); People v Jackson, 1980 Mich App 339; 446 NW2d 891 (1989); People v Powell, 201 Mich App 516; 506 NW2d 894 (1993); People v Nunez, 242 Mich App 610; 619 NW2d 550 (2000); People v Wood, 450 Mich 399; 538 NW2d 351 (1995); People v Sloan, 450 Mich 160, 201; 538 NW2d 380 (1995) [Boyle, J., dissenting opinion); People v Manning, 243 Mich App 615; 624 NW2d 746 (2000).

> of the Michigan Supreme Court that the good faith exception is not applicable to state cases in Michigan. *supra*, p 136. [Cite to NW2d.]

Significantly, this Court also denied leave to appeal in *People* v *Hill*, *supra*; *People* v *Sundling*, *supra*; and *People* v *David*, *supra*.

In *People* v *David*, *supra*, the court refused to recognize the "good faith" exception to the exclusionary rule. Even though this case was decided before *Leon*, the argument and analysis remain persuasive. The *David* court held that to recognize the good faith exception to the exclusionary rule would remove the probable cause requirement from the Fourth Amendment. The court stated:

> Such a holding [that the exclusionary rule need not be applied where the police acted unconstitutionally but in good faith] would, in effect, remove the probable cause requirement from the Fourth Amendment. A good faith exception to the exclusionary rule would insulate the magistrate's decision to grant a search warrant from appellate review. In every case where a constitutionally infirmed search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. **In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity**. *David*, *supra*, at 297-298 (emphasis added).

Perhaps the most compelling review of Michigan's jurisprudence with respect to the exclusionary rule is found in Judge Jansen's concurring opinion in *People* v *Hellis*, *supra*. Her opinion states: "...It is well established that there is no good faith exception to the exclusionary rule in Michigan, and I would adhere to that precedent." *Id* at 651.

Judge Jansen's remarks were in response to Judge O'Connell's lead opinion wherein he attempted to adopt a good faith exception.[3] After outlining the historical jurisprudence with respect to the exclusionary rule and her rejection of the good faith exception, Judge Jansen concludes:

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[3]Judge O'Connell also attempts to distinguish primary police illegality from secondary police illegality, i.e., acting upon what the police believe to be a valid warrant in the absence of police misconduct, this is simply a distinction without a difference in Michigan jurisprudence.

> "Judge O'Connell's attempt to distinguish *Hill* from the present case is a distinction without a difference and appears to be an attempt merely to diverge from the well established precedent in this state that there is no good faith exception to the exclusionary rule."

In *David*, *Sundling*, *Tanis*, *Jackson* and *Paladino*, the police relied upon search warrants that were later found to be invalid. Yet, in all those cases, the Court of Appeals still held that it would not adopt a good-faith exception to the exclusionary rule despite the fact that there was no ***primary police illegality***. Further, in *Hill*, the police first acted illegally because they did not have probable cause to arrest the defendant without a warrant. After arresting the defendant and searching him, the police were able to obtain a search warrant for the defendant's house. Because the initial arrest and search were illegal, the search warrant subsequently obtained was invalid because probable cause to issue the warrant was based upon the illegal arrest and search. The Court of Appeals held that it would not recognize and apply a good faith exception to the search warrant requirement where the police acted on a search warrant they believed was valid. *Hill*, *supra*, p 56 [cite to NW2d]. In short, there is no precedent to establish a good faith exception to the exclusionary rule in Michigan and, as Judge Cavanaugh said in *David*, "It is wrong as a matter of policy." *David*, *supra*, p. 489 [cite to NW2d].

II THIS COURT SHOULD NOT ADOPT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WHERE THAT EXCEPTION IS CONTRARY TO AND WOULD BE A SUBSTANTIAL DEPARTURE FROM THIS STATE'S EXISTING JURISPRUDENCE.

A. Adoption And Purpose of Michigan's Exclusionary Rule.

For over 80 years, Michigan jurisprudence has recognized that a violation of a defendant's constitutional rights against unlawful searches and seizures must result in the exclusion from trial of evidence so obtained. See *People* v *Marxhausen*, 204 Mich 559; 171 NW 557 (1919). The *Marxhausen* case recognized that if evidence illegally obtained can be used in evidence against a citizen accused of an offense "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution." *id*, 571 [citing *US* v *Weeks*, 232 US 383 (1914)].

The prosecution correctly points out that the exclusionary rule is a judicially created rule. In fact, the *David* court describes it as a judicially created means of effectuating Fourth Amendment rights. *David*, *supra*, p 294. Further, the majority in *Leon*, *supra*, recognizes that the exclusionary rule is a judicially created remedy rather than a personal constitutional right of the party aggrieved. *Leon*, *supra*, p 906.

However, contrary to the assertion in *Leon*, the purpose of the Michigan exclusionary rule is not merely to deter police misconduct (although that is clearly one of its goals). Instead, the broader purpose of the exclusionary rule under Michigan jurisprudence is to "deter violations of the Fourth Amendment and promote judicial integrity so that a court is not a party to the use of illegally

seized evidence." *David, supra*, p 294. The Court of Appeals in *People* v *Sundling*, 153 Mich App 277; 395 NW2d 308 (1986), described the purpose of this judge-made exclusionary rule as follows:

> Our Supreme Court adopted the exclusionary rule as a ***remedy*** *for violations of the Michigan constitutional right to be free from unreasonable searches and seizures* long before such remedy was deemed to be required under the federal constitution (citation omitted). We maintain that its existence in its present form is a necessary ingredient to the preservation of the right under the Michigan Constitution to be free from unreasonable ***government*** intrusions. Therefore, we decline to follow *Leon*." *Id*, p. 315 [cite to NW2d] (Emphasis added).

See also *People* v *Martin*, 94 Mich App 649; 290 NW2d 48 (1980). (The exclusionary rule was adopted to effectuate the Fourth Amendment's prohibition against unreasonable searches and seizures and prevents illegally seized items and statements from being admitted into evidence.) The rationale behind the exclusionary rule was stated most succinctly 80 years ago by this Court in *People* v *Halveksz*, 215 Mich 136, 138; 183 NW 952 (1921), as follows: "It is the duty of courts, when attention is seasonably called to a violation of a constitutional right, in obtaining evidence in criminal prosecutions, ***to vindicate the protection afforded individuals by the Constitution, and suppress the evidence***." (Emphasis added)

Support for Michigan's broad based exclusionary rule is found in Justice Brennan's dissent in *People* v *Leon* wherein he makes the following relevant observations:

> A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the [*Leon*] Court's deterrence rationale." *Leon, supra*, p 930.
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> This reading of the Amendment implies that its prescriptions are directed solely at those government agents who may actually invade an individual's constitutionally protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of admissibility of such

> evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. *Id*, p 931-932.
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> A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that the constitutional rights are respected. *Id*, p 933.
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> Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single government action prohibited by the terms of the Amendment. Once that connection between the evidence gathering role of the police and the evidence admitting function of the court is acknowledged, the plausibility of the [*Leon*] Court's interpretation becomes more suspect. *Id*, p 933.
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> It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police, but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial constitutional invasion of privacy, which is done after all for the purpose of securing evidence, but also the subsequent use of any evidence so obtained. *Id*, p. 935.

Justice Stevenson's opinion in *Leon* states that the exclusionary rule's purpose is "to deter-compel respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." (Cite omitted.) *If police cannot use evidence obtained through warrants issued on less than probable cause, they have less incentive to seek those warrants and magistrates have less incentive to issue them. id*, p. 974 (Emphasis added). Clearly, the deterrent is a judicial as well as a police one. Further, the exclusionary rule **protects** constitutional rights and **vindicates**

violations thereof. It promotes judicial integrity by precluding the use at trial of evidence wrongfully obtained.

The faulty premise upon which *Leon* is based is that the exclusionary rule was designed to merely deter police misconduct. When you misidentify the purpose of the exclusionary rule by limiting it to a deterrence of police misconduct, you can easily accept the good faith exception. The *Leon* court ignores its own prior rulings that the exclusionary rule has a broader purpose and pretends that the only goal of the exclusionary rule is to deter police misconduct. This has never been the sole purpose of the exclusionary rule, especially in Michigan. Instead, the purpose of the Michigan exclusionary rule is much broader, i.e., the protection and vindication of violations of citizens' constitutional rights, whether committed by the police or the judiciary.

How can you protect constitutional rights when you allow the use at trial of evidence seized in violation of those rights? Whether or not the police acted reasonably or in good faith in the execution of an invalid search or arrest warrant, the violation of the constitutional rights still exists. Focusing solely on police misconduct or the lack thereof casts aside the true purpose of the exclusionary rule. The fact that the police may not have acted improperly in the execution of an invalid search or arrest warrant does not make the deprivation of constitutional rights any less severe. **It is the fact that the warrant was issued at all** that is the constitutionally impermissible conduct which leads to the seizure of evidence that must ultimately be suppressed.

When an invalid search or arrest warrant has been issued by a court, application of the exclusionary rule precludes the use of the evidence and vindicates the violation of the constitutional rights that occurred upon its issuance in the first place. Why should we ignore the constitutional transgression by the issuing magistrate and permit the use of the seized evidence at trial just because

a police officer acted reasonably (i.e., in good faith) in the execution of a warrant? The police officer's good faith reliance upon the validity of the warrant does not make it any less invalid. The Fourth Amendment forces the government - not just the police officer - to make sure it acts consistent with its citizens' constitutional rights. To ignore the sins of the magistrate because the officer acted in good faith reduces the protection of the Fourth Amendment to mere words.

If the federal courts choose to identify and limit the purpose of the federal exclusionary rule to a mere deterrence of police misconduct, so be it. Michigan is not compelled by any constitutional rule or judicial pronouncement to blindly accept and limit the purpose of its exclusionary rule, and it has never done so.

B. *Faucett* Does Not Compel the Adoption of a Good Faith Exception.

The Court of Appeals and the prosecution have argued that because this Court has determined in *People* v *Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993), that the Michigan Constitution affords no greater constitutional protection against unreasonable searches and seizures than the United States Constitution, the Michigan courts are compelled to adopt the federal good faith exception to the exclusionary rule. What this argument fails to recognize is that the federal good faith exception is a federal judge-made rule adopting an exception to the federal judge-made exclusionary rule.

At the state and federal level, the exclusionary rule was adopted by the courts to add teeth to the enforcement of the constitutional requirements. The exclusionary rule is not a constitutional right or rule derived from the Constitution, but instead a judicially proclaimed remedy. As such, Michigan courts may adopt a broader exclusionary rule than the federal courts.

The Court of Appeals' and prosecution's arguments might be more compelling if we were attempting to expand the constitutional rights afforded to our citizens under our state Constitution as compared to those available under our federal Constitution. However, there is a real distinction between the power of this Court to adopt an expansive reading of a constitutional right (i.e., state versus federal rights) and the privilege of this Court to impose a more punishing exclusionary rule to enforce and protect its citizens' *existing* constitutional rights.

Since the exclusionary rule is a judge-made rule, Michigan is free to adopt a more demanding version of the exclusionary rule. In fact, as stated in *Sundling*, our Supreme Court adopted the exclusionary rule as a remedy for violations of the Michigan constitutional right to be free from unreasonable searches and seizures long before such remedy was required under the federal Constitution. Keep in mind that the United States Supreme Court did not impose an exclusionary rule upon the states until its ruling *Mapp* v *Ohio*, 367 US 634 (1961). Therefore, there can exist real differences between the federal exclusionary rule and the Michigan exclusionary rule, and Michigan is not compelled to adopt a good faith exception to its exclusionary rule.

More importantly, Michigan is not duty bound to adopt *Leon*'s suggestion that the sole purpose of the exclusionary rule is to deter police misconduct. Under Michigan jurisprudence, the Michigan courts are free to determine that its exclusionary rule precludes evidence not only obtained by primary police illegality but also secondary police illegality (i.e., police acting upon what they believe to be a valid warrant, which is in fact invalid). As Judge Jansen states in her opinion in *Hellis*, this is "simply a distinction without difference in Michigan jurisprudence."

Thus, although *Faucett* holds that Michigan cannot read more protection into its Article I, Section 11, rights than the Fourth Amendment provides, refusal to adopt a good faith exception to

the exclusionary rule does not expand Michigan's interpretation of the rights available under its Constitution. Instead, Michigan's refusal to adopt a good faith exception merely says that Michigan is going to be more vigilant in the protection of those rights as they exist.

Since the Michigan courts may provide greater protection to our citizens in preserving their constitutional rights, this Court is free to create its own unique version of its judge-made exclusionary rule that does not recognize a good faith exception. By the same token, Michigan courts are free to recognize a good faith exception to its exclusionary rule. For good reason, it has not and should not.

C. Just Say No to "Good Faith."

Even though Michigan can and has established its own exclusionary rule and since it is not compelled to accept the "good faith" exception set forth in *Leon*, the question still remains: Should it? The answer is a resounding no. The "good faith" exception would create a rule that, whenever a citizen is arrested with an invalid warrant, any evidence obtained against him is admissible because the police did not know the warrant was invalid. If this were the rule, what motivation would the judiciary have to issue proper warrants based upon probable cause supported by an affidavit? How are we to promote judicial integrity if there is no penalty for disregarding the rules? If the courts can use illegally obtained evidence against a defendant just because the police acted reasonably, the defendant's protection under the United States and Michigan Constitutions would not be realized.

Whether the officers were acting in good faith or not is irrelevant where the arrest itself is unlawful. The arrest is unlawful where a warrant is invalid. The warrant is invalid where it is issued contrary to the requirement that warrants be supported by probable cause. What gets lost in the *Leon*

analysis is that the little piece of paper (i.e., a search warrant) and what is required legally to get one (i.e., probable cause supported by an affidavit) are very important to maintaining the protections afforded by the United States and Michigan Constitutions. It is important to remember that it does not make the seizure of the evidence any less illegal just because an officer acted in good faith. If a seizure is based upon the failure to adhere to the constitutional requirements that warrants be based upon probable cause supported by an affidavit, then a defendant's rights are violated, and the evidence should be excluded.

Where the judicial misconduct goes to the heart of the constitutional rights being protected (i.e., no arrest warrant shall be issued without probable cause being established by affidavit), what is the sanction under a "good faith" analysis? In the present case, there was an utter failure of the affidavit requirement and, therefore, the magistrate had nothing from which to make a probable cause determination. There was no attempt whatsoever to meet the constitutional requirements. The prosecution, relying on *Arizona* v *Evans*, argues that, since the officers knew nothing of this failure, the evidence should be admitted. Under this argument, what is the Defendant's remedy for the violation of his constitutional rights? If there is no harm in issuing a warrant without probable cause, why require it?

Adopting the Supreme Court reasoning in *Evans* will allow the exception to swallow the rule[4] that the Defendant is entitled to have his arrest warrant based upon some basic showing in an affidavit to the court that he has done something permitting the seizure of his person. This case is not like *Evans*. There were no clerical mistakes here but, instead, a complete failure to issue the arrest warrant based upon probable cause supported by an affidavit. *Evans* is just a categorical exception to the exclusionary rule in the case of clerical errors. Application in this case would lead to an erosion if not the elimination of the probable cause requirement altogether. Use of the evidence obtained from a defective warrant would deny the Defendant the very constitutional rights that were intended to be protected. As Justice Brennan states in his dissent, "The court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia."

The good faith analysis asks the question, "If the officer was told to go arrest the defendant with a warrant without knowledge of its invalidity, how did the officer do anything wrong?" The

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[4]See, Hillary, Richard E., "*Arizona* v *Evans*, and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule," 27 U. Tol. L. Rev. 473, 495-496. The author states: "Evidence seized pursuant to a violation of the Fourth Amendment is tainted evidence, and a finding by a court that exclusion of such evidence will not deter future Fourth Amendment violations does not purge the evidence of its original taint. (Footnote omitted) The evidence remains a product of an unconstitutional act. By focusing exclusively on the deterrent effect of exclusion, the Court ignores the effect that judicial consent to the state's use of such evidence in its case-in-chief has on the integrity of the judicial system. (Footnote omitted) This country's judiciary must serve as a bastion of liberty and strive to avoid even the appearance of forsaking its responsibility to protect the constitutional rights of the American people. By acknowledging that an illegal search and subsequent seizure of evidence violates the Fourth Amendment while, at the same time, holding that the illegally seized evidence can be legitimately used in a court of law, the Supreme Court projects an image that the Bill of Rights, or at least the Fourth Amendment, is not seriously regarded by the highest court in the land. The result of such a projection is that the legitimacy and the integrity of the judicial system is compromised in the eyes of those who perceive the judiciary to be the vanguard of their constitutional rights."

analysis under such circumstance should be, "What are we going to do about the fact that the officer was wrongfully told to go arrest the defendant?" The *Leon* good faith analysis suffers from myopia if not amnesia. Wearing the blinders of the *Leon* "limited-purpose" analysis of the exclusionary rule leads to the false conclusion that it is unnecessary to apply the exclusionary rule when the officers act in good faith. Notwithstanding an officer's good faith, the exclusionary rule must function to vindicate violations of the Fourth Amendment rights which led to the very issuance of the invalid arrest warrant that the officers in good faith acted upon. The vindication comes in the form of exclusion of the evidence so obtained. The Michigan exclusionary rule is that reflexive.

In short, if you obtain an arrest or search warrant without adherence to the legal requirements necessary for its issuance (i.e., a showing of probable cause supported by an affidavit), any evidence ultimately obtained (whether through police misconduct or not) must be suppressed. This application of the exclusionary rule in Michigan deters not only police misconduct and vindicates Fourth Amendment violations, it maintains the integrity of the judiciary by precluding the use at trial of evidence obtained in violation of constitutional rights. It is a mistake to merely focus on the conduct of the officers when deciding when to apply the exclusionary rule. You cannot protect the Fourth Amendment rights of a defendant when you permit the admission at trial of evidence that was unreasonably seized pursuant to an invalid warrant even though the officers acted reasonably. Good faith has been and should continue to be rejected by the courts of this State.

RELIEF REQUESTED

The Defendant-Appellee hereby respectfully requests that this Court affirm the suppression of evidence and dismissal of charges in this case.

Dated: September 26, 2002

Respectfully submitted,

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BY: _____

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